Supreme Court, U.S.
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No. 00-861

IN THE

Supreme Court of the United States

CATHERINE CLINGER,

Petitioner,

v.

NEW MEXICO HIGHLANDS UNIVERSITY BOARD OF REGENTS; SELIMO RAEL; THOMAS KEESING; DAVID ARCHULETA; and LEROY SANCHEZ, in their official and individual capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

TIMOTHY L. WHITE
Counsel of Record
ATWOOD, MALONE, TURNER & SABIN, P.A.
Attorneys for Respondents
Post Office Box 20
Albuquerque, New Mexico 87103-0020
(505) 842-5715

164620

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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STATEMENT OF THE CASE

The District Court for the District of New Mexico and the Tenth Circuit Court of Appeals found summary judgment warranted in this case because the constitutional protection that petitioner seeks for her speech does not apply to an employee's criticism of her employer's internal management decisions. The summary judgment record presented to the district court contradicts several of the assertions presented by petitioner in her statement of facts. Addressing these misstated facts is necessary for the Court's analysis of the Petition.

First, no portion of the summary judgment record found in petitioner's response to the motion for summary judgment presented any court below with argument or evidence of any "public" pronouncement that the New Mexico Highlands University Board of Regents committed to a national search prior to selecting respondent Selimo Rael as interim president of Highlands. The summary judgment record is also void of any specific criticism, whether made "repeatedly and publicly" or otherwise, concerning any failure to honor the alleged commitment to a national search process. Petitioner made conclusory allegations of such criticism but never presented to the district court specific instances of speech by which the court could determine what was actually said, in the necessary review of such speech's content, form and context.

Second, petitioner's statement of the case refers to a 1994 resolution calling for a referendum of the faculty advocating a vote of no confidence with respect to four of the Regents. There is no evidence in the summary judgment record of what this "no confidence" vote was about.

Third, petitioner has never before alleged speech critical of respondent Rael related to his permanent assumption of the University presidency in 1995. Petitioner alleged before the trial court and the Court of Appeals only criticism of respondent Rael and the Regents related to Rael's prior appointment as interim president.

Finally, petitioner was not the first faculty member at Highlands ever to be denied tenure by the Board of Regents. At the time petitioner was denied tenure, two other faculty members, both male, were also denied tenure by the Regents for failing to obtain a terminal degree in their field. Other faculty members had been denied tenure by the Regents prior to 1996.

The Court of Appeals opinion does not present the question proposed by the Petition. The opinion does not hold that the process for selecting the president of a university can never be a matter of political, social or other concern to the community and entitled to constitutional protection. The decision below clearly states that, on the facts of this case, petitioner failed to show that the four instances of speech examined touched on matters of sufficient public concern to merit First Amendment protection. The Court of Appeals found that the petitioner's speech simply exhibited criticism demonstrating her difference with the Highlands Board of Regents on the internal process they followed in selecting a university president and considering an academic reorganization. Petitioner presented no facts in the summary judgment record showing a challenge to the credentials or qualifications of the president or Regents, nor that she spoke as a citizen addressing use of public monies or any other matter transcending Highlands' internal policies.

REASONS FOR DENYING THE WRIT

This Court should deny certiorari because this case and the decision of the Tenth Circuit Court of Appeals turns on its own facts, making review by this Court unnecessary. Moreover, the decision below is right and presents neither a conflict in the law, nor an important question which this Court need address.

The Court of Appeals found that petitioner's speech was criticism of the process the University used to select a president and consider an academic reorganization. The Court noted that petitioner did not challenge any official's qualification for their positions, allege any misconduct or wrongdoing in breach of a public trust nor otherwise seek to expose some misdeed. The court correctly observed petitioner's criticism to be directed at an internal administrative procedure, not implicating matters of public concern.[1]

The constitutional protection afforded a public employee's speech is determined by the content, form and context of a given statement, as revealed by the whole record.[2] The content of this speech is the crux of the public concern inquiry.[3] The district court and the court of appeals both

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1. *See Stewart v. Pulis*, No. 99-6382, 2000 U.S. App. LEXIS 18125, at *11-12 (10th Cir. Jul. 27, 2000).

2. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

3. *Withiam v. Baptist Healthcare of Oklahoma, Inc.*, 98 F.3d 581, 583 (10th Cir. 1996).

determined, reviewing the actual summary judgment record, that petitioner's speech did not merit the constitutional protection sought because, under the above analysis, petitioner was not exposing improper operations of the government or questioning the integrity of government officials. She was merely publicizing her disagreement with the decisions of those individuals.[4] The court accurately identified this challenge to be one to the internal structure and governance of the University, which the First Amendment does not require be submitted to public scrutiny and debate.

Petitioner characterizes the Tenth Circuit's decision as contrary to decisions of this Court. This position mischaracterizes those opinions, which in fact form the basis for the Tenth Circuit law on this matter. *Gardetto v. Mason*,[5] the leading Tenth Circuit authority on this question, relies on *Pickering v. Board of Education*[6] and *Connick v. Myers*,[7] which build upon and clarify the cases cited by petitioner.

Petitioner seeks to distinguish *Connick* on the false premise that the Regents in this case are alleged to have made a "public" commitment to conduct a national search for a new president. As noted in the correction to petitioner's statement of facts, this does not appear in the summary judgment record. Even if it did, it remains a false distinction because it is the content of petitioner's speech that is

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4. *Clinger v. New Mexico Highlands Univ.*, 215 F.3d 1162, 1166-67 (10th Cir. 2000). Petition, App. A at 7a-8a.

5. 100 F.3d 803, 811-12 (10th Cir. 1996).

6. 391 U.S. 563 (1968).

7. 461 U.S. 138 (1983).

determinative. That speech failed to seek to inform the public of any actual or potential wrongdoing or breach of the public trust. Petitioner's speech was, as in *Connick*, merely her opinion about her confidence or trust in her supervisors.

Petitioner's analysis of *Pickering*,[8] *Perry*,[9] *Mount Healthy*[10] and *Givhan*[11] fails to mention that each of those cases explicitly, or in the case of *Perry*, at least implicitly, found that the speech in question was clearly a matter of public concern and that evidence in the record readily supported that conclusion. The context in which the speech occurred in those cases, combined with its content, demonstrates that the public concern conclusion arose not from the fact that the criticisms were made in an educational context but rather that the speech sought to bring to light some sort of wrongdoing or criticize the qualifications or credentials of the individual officials in question.

Only in *Perry* is there no discussion that addresses the criteria later articulated in *Connick*. While the forum in which the speech is made is not determinative of its First Amendment protection, the fact that the critical statements were made before the Texas legislature leads to a ready recognition of the public concern at issue.

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8. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

9. *Perry v. Sinderman*, 408 U.S. 593 (1972).

10. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Dole*, 429 U.S. 274 (1977).

11. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 413 (1979).

Petitioner seeks to show that other courts of appeals have found speech to be of public concern within the educational context in cases distinguishable from the instant case. In each case cited by petitioner the court assumed the speech to be of public concern without discussion,[12] decided the matter before or without reference to the guidance of *Connick*,[13] or involved clearly identified and articulable policy issues whose public concern character was self evident.[14]

Finally, petitioner's attempt to give her speech public concern protection by reference to newspaper articles reporting on the selection of university presidents was also never presented to the trial court in support of her claimed First Amendment violation. The only article relevant to the present case deals with the subsequent permanent appointment of respondent Rael as university president. Petitioner's speech urged in support of her First Amendment claim dealt only with the appointment of respondent Rael as interim president, as noted above.

This Court has never held, contrary to petitioner's assertion, that any speech related to the operation of an educational institution is of public concern. To the contrary, this Court instructs:

> To presume that all matters which transpire within a [public institution] are of public concern would

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12. *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987).

13. *Trotman v. Board of Trustees*, 635 F.2d 216 (3d Cir. 1980); *Honore*.

14. *Southside Pub. Sch. v. Hill*, 827 F.2d 270 (8th Cir. 1987); *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988).

> mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.[15]

This case, as correctly decided by the Tenth Circuit Court of Appeals, presents only an "attempt to constitutionalize [an] employee grievance. . . ."[16]

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15. *Connick*, 461 U.S. at 148.

16. *Id.* at 154.

CONCLUSION

Connick v. Myers controls this case.[17] The Tenth Circuit Court of Appeals authorities noted here of *Gardetto*, *Clinger*, and *Stewart* were each authored by Chief Circuit Judge Tacha. Her analysis of the controlling principles as applied to the facts of this case is consistent with Tenth Circuit law and is based upon the controlling precedents of this Court. Petitioner's failure to demonstrate in the summary judgment record that her speech went beyond a mere challenge to internal decisions of university government, to speak out as a citizen about governmental misconduct, compelled the court's decision.

Petitioner fails to advance any significant or substantial reason for review. The Tenth Circuit of Appeals properly applied the well-settled principles regarding First Amendment protection of public employee speech. Review by the Supreme Court would not fulfill any requirement of or advance any goal of Rule 10 of this Court, and the Petition should be denied.

Respectfully submitted,

TIMOTHY L. WHITE
Counsel of Record
ATWOOD, MALONE, TURNER & SABIN, P.A.
Attorneys for Respondents
Post Office Box 20
Albuquerque, New Mexico 87103-0020
(505) 842-5715

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17. 461 U.S. 438 (1983).